UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

EDWARD L. HEWES,	***)***	
	)	
Petitioner	***)***	
	)	
v.	***)***	***Docket No. 00-351-P-C***
	)	
WARDEN, Maine State Prison,	***)***	
	)	
Respondent	***)***	

RECOMMENDED DECISION ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, appearing *pro se*, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in connection with the sentence imposed by the Maine Superior Court (Penobscot County) after a jury convicted him on charges of gross sexual assault, in violation of 17-A M.R.S.A. § 253, and unlawful sexual contact, in violation of 17-A M.R.S.A. § 255. The respondent has moved for dismissal of the petition. I recommend that the motion be granted.

I. Background

The petitioner was indicted on charges of gross sexual assault, burglary and unlawful sexual contact on June 5, 1995. Docket Sheet, *State of Maine v. Edward Hewes*, Maine Superior Court (Penobscot County), Docket No. CR-95-400, at [1]. After a jury trial, he was convicted on the first and third charges and acquitted on the second on November 1, 1995. *Id*. at [5]. He was sentenced to concurrent terms of imprisonment of 17½ and 4 years. *Id*. at [6]. His direct appeal from that conviction was denied by the Maine Law Court. *State v. Hewes*, 691 A.2d 1197 (Me. 1997) (per curiam). He did not seek review from the United States Supreme Court by writ of certiorari.

On August 31, 1998 the petitioner filed a petition for post conviction review in state court. Docket Sheet, *State of Maine v. Edward L. Hewes*, Maine Superior Court (Penobscot County), Docket No. BANSC-CR-1998-00536 ("Post Conviction Docket"), at 1. Following an evidentiary hearing, *id.* at 6-7, the court denied relief by order dated August 13, 1999, Decision and Judgment, *Edward L. Hewes v. State of Maine*, Maine Superior Court (Penobscot County), Docket No. CR-98-536 ("State Post-Conviction Decision"). The petitioner's request for a certificate of probable cause to appeal from this decision was denied by the Law Court on October 27, 1999. Post Conviction Docket at 7.

The present petition was filed in this court on October 27, 2000. Docket.

II. Discussion

In 1996 Congress, through the vehicle of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), imposed for the first time a limitations period on the filing of habeas petitions as well as on motions filed pursuant to 28 U.S.C. § 2255. *See Rogers v. United States*, 180 F.3d 349, 353 & n.8, 355 (1st Cir. 1999). AEDPA requires the filing of habeas petitions within one year of the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review of the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1). "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

The state contends that this statute of limitations requires dismissal of the petition at issue. Respondent's Motion to Dismiss (Docket No. 4) at 5-11. The petitioner does not dispute that his conviction became final for purposes of section 2244(d) on June 18, 1997, ninety days after the entry of judgment by the Law Court on his appeal, because that is the period allowed for seeking a writ of certiorari from the Supreme Court under 28 U.S.C. § 2101(c). If none of the exceptions set forth in section 2244 apply, and if the petitioner cannot establish his entitlement to equitable tolling of the limitations period, the period of limitations expired one year later, on June 18, 1998. This petition, filed on October 27, 2000,[1] would clearly be untimely.

In this case, no state post-conviction review proceeding was pending during the entirety of the limitations period, the petitioner having first filed for state post-conviction review on August 31, 1998, approximately two months after the end of the limitations period. Petitioner's Response to State's Respondent's [sic] Motion to Dismiss Petitioner's Federal Habeas Corpus Petition Pursuant to, [sic] 28 U.S.C. § 2254(a) ("Response to Motion") (Docket No. 10) at 5. Section 2244(d)(2) on its face provides merely that time spent in state post-conviction review proceedings is not countable

[1] Under the "prisoner mailbox rule," a habeas petitions filed by a *pro se* litigant is deemed to have been filed on the date on which the prisoner delivers the petition to prison authorities for mailing. *Morales-Rivera v. United States*, 184 F.3d 109, 110-11 (1st Cir. 1999). The petition in this case does not refer to delivery to prison authorities for mailing but does state that it was mailed on October 25, 2000. Certificate of Service, Petition Under 28 USC § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Petition") (Docket No. 1). Giving the petitioner the benefit of the two additional days that would be provided by application of the mailbox rule has no effect on this outcome of this analysis.

toward the period of limitation. Contrary to the petitioner's argument, the statute neither contemplates nor hints that the filing of subsequent post-conviction review proceedings could revive or in any other way extend a lapsed period of limitation. Not surprisingly, the Court of Appeals for the Eighth Circuit, in what appears to be the sole published case directly addressing the question, came to this conclusion. *Jackson v. Dormire*, 180 F.3d 919, 920 (8th Cir. 1999) (noting that to allow petitioner "to return to state court and exhaust after the one-year statutory limitations period has expired would defeat the purpose of [AEDPA] to expedite federal habeas review . . . ."). The same analysis is applicable to the petitioner's proffered variation on this argument: that the AEDPA limitations period cannot begin to run until the time allowed by applicable state statutes for the filing of petitions for state post-conviction review has run. Response to Motion at 2-6.[2]

The question therefore becomes whether any of the exceptions set forth in section 2244(d)(1)(B)-(D) applies in this case. The petitioner's response, although difficult to follow, does not refer to any newly recognized constitutional right, however expansively that response may be construed, so the exception created by subsection (C) need not be considered further. Similarly, the response does not identify any impediment created by state action that prevented the petitioner from filing this petition on or before June 18, 1998 in violation of the Constitution or laws of the United States.[3] The response is replete with references to the petitioner's constitutional rights, *id*. at 4, 5, 7-8,

[2] To the extent that the petitioner's response can be construed to argue that the AEDPA statute of limitations is itself unconstitutional, that argument has been rejected by every federal court of appeals that has addressed it. *E.g.*, *Wyzykowski v. Department of Corrections*, 226 F.3d 1213, 1215-17 (11th Cir. 2000); *Green v. White*, 223 F.3d 1001, 1003-04 (9th Cir. 2000); *Mueller v. Angelone*, 181 F.3d 557, 572-73 (4th Cir. 1999). Even if the petitioner's response could also reasonably be construed to rely on an assertion of actual innocence in support of an allegation of unconstitutionality of the statute of limitations as it applies to him, *see Molo v. Johnson*, 207 F.3d 773, 775 (5th Cir. 2000), the response contains no sworn assertion of actual innocence, and the petitioner's discussion of the evidence does not allow a reasonable inference of innocence to be drawn.

[3] The petitioner does suggest that the court should add an unspecified additional amount of time to the statutory limitations period "for how long it took Petitioner to take in obtain [sic] transcripts due to state interference because of Petitioner's lack of finances." Response to Motion at 6. In the event that some constitutional or federal statutory violation is suggested by this allegation, the record reflects that the transcript of the state trial was available no later than April 17, 1997, Trial Docket at [8], well before the section 2244(d)(1) deadline, and the petitioner did not request a transcript of the state post-conviction review proceeding until July 19, 1999, (*continued on next page*)

9, 10-11, 14-15, 16, 17, 18, 21, 24, 26, 29, 30-31, 32-34, but none of the alleged violations of those long-established rights is alleged to have prevented the petitioner from filing this petition before June 18, 1998. Accordingly, the exception created by section 2244(d)(1)(B) is not applicable here. Finally, the response mentions "newly discovered evidence" on several occasions, *id*. at 10, 23, 24, 28, in an apparent attempt to invoke the exception created by section 2244(d)(1)(D). However, the petitioner fails even to allege that any such evidence, if indeed it was "newly discovered" at all, could not have been discovered before June 18, 1998. Had such an allegation indeed been made, the record reflects that the evidence clearly was known to the petitioner when he filed his amended petition, dated March 7, 1999, for post-conviction review in state court, Amended Petition for Post Conviction Review, *Edward Hewes v. State of Maine,* Maine Superior Court (Penobscot County), Docket No. CR-98-536 (copy attached as Exh. 26 to Petition), at 3-6, 7-8, and State Post-Conviction Decision at 2-4, 8-9, yet the instant petition was filed in this court more than one year thereafter.[4] Accordingly, the final possible exception under section 2244(d)(1) is not available to the petitioner.

The petitioner's response may also be construed to allege that he is entitled to equitable tolling of the limitations period.[5] "[T]his equitable remedy is only available when an inmate diligently pursues his claims and demonstrates that the failure to timely file was caused by extraordinary circumstances beyond his control." *Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000). Here, the petitioner has made no such showing; there is no suggestion that the "rare and exceptional circumstances" that justify application of the doctrine, *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000), are present here. The petitioner offers no explanation for his delay in filing other than those

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Post Conviction Docket at 7, well after the section 2244(d)(1) deadline. Any delay by the state in providing either transcript, once requested, thus could not have prevented timely filing of this action.

[4] Neither party has provided the court with a copy of the plaintiff's initial petition for state post-conviction review.

[5] The First Circuit has reserved ruling on the question whether section 2244's statute of limitations is subject to equitable tolling. *Libby v. Magnusson*, 177 F.3d 43, 48 n.2 (1st Cir. 1999). My analysis assumes applicability of the doctrine *arguendo*.

discussed above and, for the reasons already set forth, those circumstances cannot be considered extraordinary, rare or exceptional.

III. Conclusion

For the foregoing reasons, I recommend that the respondent's motion to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Date this 4th day of April, 2001.

David M. Cohen
United States Magistrate Judge

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plaintiff

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